UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO, *et al.*, Debtors.[1]	PROMESA Title III Case No. 17-BK-3283-LTS (Jointly Administered)
In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY, Debtors.	PROMESA Title III Case No. 17 BK 3567-LTS
AMERINATIONAL COMMUNITY SERVICES, LLC, as Servicer for the GDB Debt Recovery Authority, and CANTOR-KATZ COLLATERAL MONITOR LLC, Plaintiffs, v. AMBAC ASSURANCE CORPORATION, ASSURED GUARANTY CORP., ASSURED GUARANTY MUNICIPAL CORP., FINANCIAL GUARANTY INSURANCE COMPANY, NATIONAL PUBLIC FINANCE GUARANTEE	Adv. Pro. No. 21-00068-LTS

[1] The Debtors in these Title III cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's Federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico ("Commonwealth") (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 04780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

CORPORATION, PEAJE INVESTMENTS LLC, and THE BANK OF NEW YORK MELLON, as Fiscal Agent, Defendants.	
AMBAC ASSURANCE CORPORATION, ASSURED GUARANTY CORP., ASSURED GUARANTY MUNICIPAL CORP., NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION, FINANCIAL GUARANTEE CORPORATION, FINANCIAL GUARANTY INSURANCE COMPANY, and PEAJE INVESTMENTS LLC, Counterclaim Plaintiffs/Third Party Plaintiffs, v. AMERINATIONAL COMMUNITY SERVICES, LLC, as Servicer for the GDB Debt Recovery Authority, and CANTOR-KATZ COLLATERAL MONITOR LLC, Counterclaim Defendants, and GDB DEBT RECOVERY AUTHORITY, Third-Party Defendant.	Adv. Pro. No. 21-00068-LTS

DEFENDANTS' OPPOSITION TO THE URGENT MOTION OF THE DRA PARTIES FOR LEAVE TO FILE LIMITED SUR-REPLY WITH RESPECT TO OPPOSITION TO MOTIONS TO DISMISS THE ADVERSARY PROCEEDING

To the Honorable United States District Court Judge Laura Taylor Swain:

Ambac Assurance Corporation ("Ambac"), Assured Guaranty Corp., Assured Guaranty Municipal Corp. (with Assured Guaranty Corp., "Assured"), Financial Guaranty Insurance Company ("FGIC"), National Public Finance Guarantee Corporation (with Ambac, Assured, and FGIC, the "Monolines"), The Bank of New York Mellon, as Fiscal Agent (the "Fiscal Agent"), and Peaje Investments LLC (with the Monolines and the Fiscal Agent, "Defendants") respectfully submit this opposition to the *Urgent Motion of the DRA Parties for Leave to File Limited Sur-Reply with Respect to Opposition to Motions to Dismiss the Adversary Proceeding*, ECF No. 70 (the "Motion for Leave").[2]

ARGUMENT

1. As the Court knows, the parties to this adversary proceeding and the intervenors remain in the throes of expensive litigation concerning the claims and allegations in the DRA Parties' Complaint and related objections to the Commonwealth's Plan of Adjustment. The motions to dismiss are now fully briefed, and the Court has the opportunity to render a fully informed decision. No matter the outcome, the Court's decision promises to streamline these proceedings and the confirmation hearing to the benefit of all parties. The greater the delay, the greater the cost on the Commonwealth and all of its constituents. It would be one thing if the DRA Parties had identified new issues of consequence raised for the first time in the Reply that in fairness should be considered by the Court only after hearing from the DRA Parties yet again. But

[2] Unless otherwise indicated, references to "ECF No." refer to filings in Adv. Proc. No. 21-00068-LTS. Capitalized terms not otherwise defined herein have the meaning ascribed to them in *Defendants' Motion to Dismiss the Complaint*, ECF No. 44 (the "Motion to Dismiss"). "Reply" refers to *Defendants' Reply in Support of Their Motion to Dismiss the Complaint*, ECF No. 68, and "Opposition" refers to *Plaintiffs' Memorandum of Law in Opposition to the Motions to Dismiss*, ECF No. 60.

they identified none. They provided this Court with not even the thinnest reed on which to grant the Motion for Leave. It should be denied.

2. The Motion for Leave does not come close to making the showing required to warrant a sur-reply. It makes conclusory assertions that Defendants advanced "new arguments" in their Reply but does not even attempt to identify a single new argument. That alone compels denial of the Motion for Leave. *See Animal Welfare Ins. v. Martin*, 588 F. Supp. 2d 70, 81 (D. Me. 2008) (explaining that a sur-reply is warranted only if "truly new" matters are introduced in a reply brief).

3. The reason the Motion for Leave identifies no new arguments is that Defendants made none in their Reply. Tellingly, when pressed multiple times during the parties' meet-and-confer to identify the new arguments in Defendants' Reply, the DRA Parties declined, except to point to a single sentence in the Reply reiterating that certain GDB/HTA Loans are not payable from the Acts 30-31 Revenues. (*See* Reply ¶ 30.) But that assertion was not new: Defendants made it ***twice*** in the Motion to Dismiss (*see* Motion to Dismiss ¶ 17 n.4, ¶ 98 & n.16), and the DRA Parties simply failed to respond to it. Indeed, the Reply specifically cited to the portions of the Motion to Dismiss where that argument had been made (*see* Reply ¶ 30), belying any assertion that this was a "new" argument. It does not provide a basis for a sur-reply. (Further, having failed to identify a single "new" argument, the DRA Parties should not be permitted to raise any purported new arguments for the first time in their reply on the Motion for Leave, when Defendants may not have an opportunity to respond. *See Ingeniador, LLC v. Jeffers, Inc.*, 2014 WL 2918586, at *4 (D.P.R. June 26, 2014) (holding that it was "procedurally improper" for a party to use a reply brief to "flesh out" a conclusory argument made in the moving brief and striking that party's argument (citing D.P.R. Loc. Civ. R. 7(c))).

4. The Motion for Leave also asserts that the DRA Parties should be permitted to file a sur-reply so that they can "clarify the DRA's position on certain issues with respect to which the Intervenor and the Defendants claimed that the DRA Parties failed to respond." (Motion for Leave ¶ 6.) That is not a valid basis for seeking a sur-reply. *See WW, LLC v. Coffee Beanery, Ltd.*, 2011 WL 5110267, at *5 (D. Md. Oct. 26, 2011) ("While Plaintiffs claim that a surreply was necessary to correct misrepresentations of the law and the record, that is not proper grounds for the filing of a surreply."). If, as the DRA Parties contend, their Opposition ***did*** respond to all of Defendants' arguments, the Court can make that determination from the previously-filed papers, as it would on any motion. There is no basis for granting the DRA Parties a sur-reply to clean up arguments that Defendants rightfully pointed out were deficient.

5. The DRA Parties' true motivation for seeking a sur-reply became clear during the parties' meet-and-confer call on the Motion for Leave: As the DRA Parties' counsel advised during the meet-and-confer, they want another chance to submit their views "before the Court rules" on the Motion to Dismiss. Indeed, during the meet-and-confer, the DRA Parties' counsel complained that the Reply gave Defendants a second opportunity to submit papers (as with any reply on any motion) and repeated arguments from the Motion to Dismiss. Even if the latter were true—and it is not—that also would not be a basis for filing a sur-reply. The Court plainly would not be served by the DRA Parties submitting a sur-reply to point out instances in which Defendants purportedly repeated arguments from their Motion to Dismiss. The Court indicated that it would take the Motion to Dismiss on submission after the filing of the Reply,[3] and the DRA Parties have provided no reason to inject further proceedings before the Court renders its decision. That the DRA Parties have requested 12 days and 25 pages for a sur-reply itself demonstrates that their goal

[3] *See Order on Joint Status Report Pursuant to Court Order Dated July 16, 2021, [ECF No. 17387] with Respect to (I) DRA Parties Administrative Expense Claim Motion And (II) DRA Adversary Proceeding*, ECF No. 25, at 4.

is to further delay and multiply these proceedings, not to address any particular "new" arguments with a proposal for a narrowly-tailored brief in an abbreviated time period.[4]

6. As discussed above, the DRA Parties' request is far from harmless. It is past time to resolve the issues that have held the attention of too many for too long. The DRA Parties insist that there will be no prejudice because the Motion to Dismiss "has been pending for six weeks already[,]" and "[t]he allowance of another ten days for a sur-reply will not prejudice any party." (Motion for Leave ¶ 9.) That the Motion to Dismiss has been pending for six weeks is entirely beside the point. Additional briefing would jeopardize the schedule proposed and agreed to by the parties and the process established by the Court for addressing unresolved issues from this adversary proceeding before (and certainly not later than) the plan confirmation hearing.[5] Indeed, fact discovery in connection with plan confirmation proceedings concluded on October 11, 2021, with expert discovery set to conclude on October 18, 2021, and the DRA Parties' plan confirmation objections due the next day. Under the DRA Parties' proposal to submit a sur-reply on October 20, 2021, they would be briefing the same issues that they purportedly would be addressing in their plan confirmation objections two days earlier. There is no reason, as a matter of judicial economy or the full and fair litigation of the sufficiency of the DRA Parties' Complaint, why the DRA Parties should be permitted to ignore the schedule and process in place, especially when they have provided no justification for a sur-reply.

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[4] Indeed, the DRA Parties request even more pages and time for a sur-reply than is allowed for a ***reply*** brief under both the Court's *Fifteenth Amended Notice, Case Management and Administrative Procedures Order* (Case No. 17-03283-LTS, ECF No. 17127-1, ¶ I.E, ¶ III.K) and the Court's *Second Amended Standing Order* (Case No. 17-03283-LTS, ECF No. 15895-1, ¶ 2(a)(iii), ¶ 2(c)).

[5] *See Order on Joint Status Report Pursuant to Court Order Dated July 16, 2021, [ECF No. 17387] with Respect to (I) DRA Parties Administrative Expense Claim Motion And (II) DRA Adversary Proceeding*, ECF No. 25, at 4 ("The Parties shall, with respect to all unresolved issues raised in the DRA Adversary Proceeding, the Dispositive Motions, and/or the Administrative Expense Claim Motion, make the necessary submissions and take all necessary actions in compliance with the Court's scheduling and procedure orders concerning the confirmation proceedings relating to the [Plan], including the filing of objections to the Plan (and replies thereto) relating to such issues.").

7. Moreover, especially given the DRA Parties' inability to identify new arguments to respond to, a sur-reply affords the DRA Parties an opportunity to introduce new arguments. Defendants then would have no opportunity to respond, unless they requested leave to file a *sur*-sur-reply, which would further delay the resolution of fully briefed issues.

8. By contrast, denial of the Motion for Leave would not prejudice the DRA Parties. The DRA Parties have already filed hundreds of pages before this Court outlining their positions with respect to their asserted priority and lien and payment rights, including in their Opposition and in briefing on their motion seeking allowance of an administrative expense claim. (*See* Case No. 17-03283-LTS, ECF No. 17009.) They have had more than sufficient opportunity to articulate their arguments. And they continue to have other opportunities, including in any confirmation objection.

9. For these reasons, the Motion for Leave should be denied.

Dated: October 13, 2021
San Juan, Puerto Rico

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